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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/559,851	12/02/2005	Michael Andrew Singer	3001	7427

7590 05/06/2010  
Albert Brent  
269-27N Grand Central Parkway  
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EXAMINER
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BEKKER, KELLY JO

ART UNIT	PAPER NUMBER
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1781

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PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.



### **DETAILED ACTION**

Amendments made 1/28/10 have been entered.

Claims 21, 22, 30, and 31 remain pending.

#### ***Claim Rejections - 35 USC § 112***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

The 112 second paragraph rejections of claims 21, 22, and 30 as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention have been withdrawn in light of applicant's amendments made January 28, 2010.

#### ***Claim Rejections - 35 USC § 103***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 21, 22, 30 and 31 are rejected under 35 U.S.C. 103(a) as being unpatentable over Nestelle (WO 01/28357 A2) as evidenced by China (China Natural Products Group inc, Lo Han Kuo Extract from Fresh Fruit page 1). The references and rejection are incorporated herein and as cited in the office action mailed July 23, 2009. Specifically regarding the newly added limitations, Nestelle teaches that sweetener is powdered (page 8 lines 9-13).

#### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir.

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1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 21, 22, 30 and 31 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-3 of U.S. Patent No. 6,773,743 B1 ('743). The references and rejection are incorporated herein and as cited in the office action mailed July 23, 2009.

### ***Terminal Disclaimer***

The terminal disclaimer filed on January 28, 2010 disclaiming the terminal portion of any patent granted on this application which would extend beyond the expiration date of U.S. Patent No. 6,773,743 B1 has been reviewed and is NOT accepted.

It does not include a recitation that any patent granted shall be enforceable only for and during such period that said patent is commonly owned with the application(s) or patent(s) which formed the basis for the double patenting rejection. See 37 CFR 1.321(c)(3).

### ***Response to Arguments***

Applicant's arguments filed January 28, 2010 have been fully considered but they are not persuasive.

In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., the exclusion of a bulk sweetener in the powder and the sweetener consisting of extract powder and sucralose powder) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057

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(Fed. Cir. 1993). The claims recite a composition comprising the lo han kuo extract and sucralose powder, and thus the composition may include other ingredients, such as a bulk sweetener, besides the ones instantly claimed; the composition does not exclude bulk sweeteners and is not limited to a composition "consisting of" specific ingredients, wherein only the listed ingredients are included.

### ***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to **KELLY BEKKER** whose telephone number is (571)272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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